STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2011
v	No. 295997 Wayne Circuit Court
ELGIN AUGUSTA FINNIE, Defendant-Appellant.	LC No. 09-014274-FH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Defendant pleaded guilty of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant under the Holmes youthful trainee act (HYTA), MCL 762.11 *et seq*., to 18 months' imprisonment. We granted defendant's delayed application for leave to appeal, and now remand to allow him to move to withdraw his plea or for resentencing. We have decided this appeal without oral argument in conformity with MCR 7.214(E).

Defendant accepted the prosecutor's offer that he plead guilty of second-degree home invasion in exchange for "a Guideline Sentence, Guidelines being 0 to 11" months. At the sentencing hearing, defendant requested a sentence pursuant to the HYTA. The trial court subsequently rescored Offense Variable ("OV") 9, MCL 777.39, which increased the guidelines range to zero to 17 months. The trial court sentenced defendant under the HYTA to serve "18 months in the Thumb Correctional Facility," explaining that it exceeded the guidelines because of "the long history of Juvenile contact."

Defendant first contends that he should receive specific performance of his sentence agreement. However, when the prosecutor and a defendant reach a sentence agreement, "[a] breach of . . . [the] sentence agreement . . . only entitles defendant to withdraw his guilty plea. Specific performance is not available as an alternative remedy because the authority to pronounce sentences is within the exclusive province of the judiciary and the prosecutor cannot bind the court with a sentence bargain." *People v Dixon*, 103 Mich App 518, 524; 303 NW2d 32 (1981); see also *People v Killebrew*, 416 Mich 189, 194-195; 330 NW2d 834 (1982) (observing that if a court opts against enforcing a sentence bargain, "the defendant must be given the opportunity to withdraw his guilty plea").

The trial court assigned defendant the status of a youthful trainee under MCL 762.11(1), which envisions that this status may be conferred "without entering a judgment of conviction." Another section of the HYTA, MCL 762.14, details in pertinent part:

> (1) If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings.
>
> (2) An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime . . . .

The prosecutor theorizes that the instant sentence agreement is meaningless given that (1) as contemplated by the HYTA, the court did not initially enter a judgment of conviction, and (2) no "sentence" can exist until after the entry of a judgment of conviction. The prosecutor's argument does not convince us that placement under the HYTA renders a sentence agreement inapplicable or irrelevant. The trial court here could have remanded defendant to a correctional facility or county jail for 11 months, MCL 762.13(1), consistent with the sentence agreement. Irrespective that the sentence in this case may not have been imposed following a conviction, the sentence nonetheless constituted a determination of the appropriate penalty for imposition after the adjudication of a criminal charge. Because the sentence term imposed exceeded that contemplated in the parties' sentencing agreement, we must afford defendant an opportunity to withdraw his plea.[1] *Killebrew*, 416 Mich at 194-195; *Dixon*, 103 Mich App at 524.

Defendant next urges that he was deprived of the effective assistance of counsel when his attorney acquiesced in the 10-point scoring of OV 9 at the sentencing hearing. A defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of reasonable professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

OV 9, which addresses the number of victims of a crime, authorizes the scoring of 10 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c). Two people

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[1] It appears unclear whether defendant would benefit from a withdrawal of his plea, in part because such an action would jeopardize his treatment under the HYTA.

lived in the home that defendant invaded, but neither victim was home at the time of the offense; the prosecutor concedes that the trial court misscored OV9. Therefore, defense counsel acted unreasonably by failing to object to the 10-point scoring of OV 9. Had the court correctly scored OV 9 at zero, the guidelines would have remained between zero and 11 months, rather than zero to 17 months. Although the trial court ultimately deviated from the guidelines, it does not appear clear to us that the court would have deviated to the same degree had the guidelines been correctly scored. Stated differently, if defense counsel had objected, it seems at least reasonably probable that the court would have deviated to a lesser extent. We conclude that defense counsel was ineffective for failing to object to the scoring of OV 9, the trial court misscored the sentencing guidelines, and remand is appropriate to afford defendant "the opportunity to be resentenced on the basis of accurate information." *People v Fransicso*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

Defendant lastly complains that the trial court should have stricken inaccurate handwritten notations on the presentence report, in accord with MCL 771.14(6):

> At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

The trial court apparently wrote on the bottom of the first page of the presentence investigation report, "Victims; Mr and Mrs, defendant and two friends broke in ; lost 4,000; have receipts for loss." Defendant did not object at the sentencing hearing to any purportedly inaccurate information. We detect no plain error relating to the handwritten note because the note accurately summarized victim testimony at the sentencing hearing. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Remanded to allow defendant to move for withdrawal of his plea or for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro